MBf Capital Bhd & Anor v Dato' Param Cumaraswamy

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-23-68 OF 1996
ZAINUN ALI JC
28 JUNE 1997

Civil Procedure *— Writ of summons — Striking out — Ground: Immunity from legal process — Defamation proceedings — Whether court ought to determine question of probative status of documentary evidence at this stage — Convention on the Privileges and Immunities of the United Nations 1946 s 22 — Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 art 12 — Diplomatic Privileges (Vienna Convention) Act 1966 — International Organizations (Privileges and Immunities) Act 1992*

Civil Procedure *— Jurisdiction — Immunity of United Nations Special Rapporteur — Whether court had jurisdiction to hear plaintiffs' action for defamation — Whether defendant was immune from legal process when he made the alleged defamatory statements — Whether it was shown that no matter what were the facts that the plaintiff would be able to establish relating to the subject matter of the dispute, the court would have no power to grant relief of the kind sought against the defendant*

The plaintiffs, a public-listed company and a licensed stock-broking company respectively, instituted defamation proceedings against the defendant, an advocate and solicitor of the High Court of Malaya, and the chief executive and partner of a firm of advocates and solicitors in Malaysia. The defendant was appointed as a UN Special Rapporteur for a three-year period commencing 2 April 1994. The action was in relation to an article ('the article') which appeared in the November 1995 issue of the International Commercial Litigation Magazine ('the magazine') under the caption 'Malaysian Justice on Trial'.

The defendant applied to set aside and/or strike out the plaintiffs' writ on the basis that the statements attributed to the defendant were made in his capacity as a United Nations Special Rapporteur on the independance of judges and lawyers and that it was made in the course of his mission as such. The defendant claimed that he was immune from legal process of every kind and that this court had no jurisdiction to hear the plaintiffs' action.

On behalf of the defendant, certificates issued by the Secretary-General to the United Nations and the Minister of Foreign Affairs were produced which explained the privileges and immunities granted to the defendant. The plaintiffs argued that the defendant's mandate was a functional, limited and a qualified one in its scope and that for as long as he performed his duties and functions within the scope of his mandate, he enjoyed the privileges and immunites under s 22 of the Convention on the Privileges and Immunities of the United Nations 1946. On the other hand, it was contended by the plaintiffs that by so making the alleged defamatory statement against the

plaintiffs to a private commercial litigation magazine, the defendant had clearly acted outside his mandate and therefore was not entitled to immunity.

The issues before the court were, inter alia: (i) how the court should view the certificates (especially the certificate issued by the Secretary-General) at this stage; and (ii) whether the defendant was excluded from the jurisdiction of the court.

Held, dismissing the application:

(1) The court ought not be drawn at this stage into the question of the probative status of both the Secretary-General's and the Minister's certificates. In this case, the court ought to exercise judicial self-restraint. Therefore, the question as to whether the defendant's act was or was not within the scope of his mandate was an elusive inquiry — to be answered only when matters of evidence was before the court. The court therefore would have to consider the whole context in which the claim against the defendant was made, with a view to deciding whether the relevant act upon which the plaintiffs' claim was based should, in that connection, be contemplated as fairly within the area of activity of his mandate or otherwise (see p 313H–I).

(2) For purposes of determining jurisdiction, it must be assumed that the allegation in the plaintiffs' statement of claim was true and, since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons could succeed only if it is shown that no matter what were the facts that the plaintiff would be able to establish relating to the subject matter of the dispute, the court would have no power to grant relief of the kind sought against the defendant. In the circumstances, it could not be said that the defendant was absolutely protected by the immunity he claimed (see pp 315I and 316A–B); *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 followed.

[Bahasa Malaysia summary

Plaintif-plaintif, iaitu syarikat awam dan syarikat broker saham berlesen masing-masing, memulakan prosiding fitnah terhadap defendan, seorang peguambela dan peguamcara Mahkamah Tinggi Malaya, dan ketua eksekutif dan rakan kongsi sebuah firma peguambela dan peguamcara di Malaysia. Defendan dilantik sebagai Pelapor Khas Bangsa-Bangsa Bersatu untuk tempoh masa tiga tahun bermula daripada 2 April 1994. Tindakan itu adalah berkaitan dengan satu artikel ('artikel tersebut') yang disiarkan dalam keluaran November 1995 International Commercial Litigation Magazine ('majalah tersebut') di bawah tajuk 'Malaysian Justice on Trial'.

Defendan memohon untuk mengetepikan dan/atau membatalkan writ plaintif-plaintif atas alasan bahawa kenyataan-kenyataan berkenaan dengan defendan dibuat dalam keupayaannya sebagai Pelapor Khas Bangsa-Bangsa Bersatu berkenaan dengan kebebasan hakim-hakim dan peguam-peguam dan bahawa ia dibuat semasa misinya yang sedemikian. Defendan mendakwa bahawa beliau adalah kebal daripada proses undang-undang dalam bentuk apa pun dan bahawa mahkamah ini tidak mempunyai bidang kuasa untuk mendengar tindakan plaintif-plaintif.

Bagi pihak defendan, sijil-sijil yang dikeluarkan oleh Setiausaha Agung Bangsa-Bangsa Bersatu dan Menteri Hal Ehwal Luar Negeri ditunjukkan yang menerangkan perlindungan dan kekebalan yang diberikan kepada defendan. Plaintif-plaintif menghujahkan bahawa mandat defendan adalah berfungsi, terhad dan terbatas dalam skopnya dan bahawa selagi beliau menjalankan tugas-tugas dan fungsi-fungsinya dalam skop mandatnya, beliau memperolehi perlindungan dan kekebalan di bawah s 22 Konvensyen Perlindungan dan Kekebalan Bangsa-Bangsa Bersatu 1946. Sebaliknya, adalah dihujahkan oleh plaintif-plaintif bahawa dengan membuat kenyataan fitnah yang dikatakan terhadap plaintif-plaintif kepada majalah litigasi komersial persendirian, defendan telah dengan jelasnya bertindak diluar mandatnya dan dengan itu tidak layak kepada kekebalan.

Isu di hadapan mahkamah adalah, antara lain: (i) bagaimana mahkamah patut menimbangkan sijil-sijil itu (terutamanya sijil yang dikeluarkan oleh Setiausaha Agung) pada peringkat ini; dan (ii) sama ada defendan adalah dikecualikan daripada bidang kuasa mahkamah.

Diputuskan, menolak permohonan:

(1) Mahkamah tidak patut dibawa pada peringkat ini kepada persoalan status probatif sijil kedua-dua Setiausaha Agung dan Menteri. Dalam kes ini, mahkamah patut melaksanakan kehakiman yang terkawal. Oleh itu, persoalan sama ada tindakan defendan adalah dalam skop mandatnya adalah pertanyaan yang sukar — hanya perlu dijawab apabila perkara-perkara bukti berada di hadapan mahkamah. Mahkamah dengan itu perlu menimbangkan konteks keseluruhan dalam mana tuntutan terhadap defendan dibuat, dengan tujuan untuk memutuskan sama ada tindakan yang relevan di mana tuntutan plaintif-plaintif didasarkan patut, berhubung dengan perkara ini, dianggap sebagai secara wajarnya dalam lingkungan aktiviti mandatnya atau sebaliknya (lihat ms 313H–I).

(2) Untuk tujuan menentukan bidang kuasa, mesti dianggap bahawa pengataan dalam pernyataan tuntutan plaintif-plaintif adalah benar dan, oleh kerana ketiadaan bidang kuasa mempunyai akibat bahawa mahkamah tidak mempunyai hak untuk menentukan pertanyaan sama ada wujud keadaan fakta-fakta yang memberikan hak kepada mahkamah untuk memberikan kepada plaintif relief yang dipohon, saman bidang kuasa hanya boleh berjaya jika

ianya ditunjukkan bahawa tidak kira apa jua fakta yang dapat dibuktikan oleh plaintif-plaintif berkaitan dengan perkara subjek pertikaian, mahkamah tidak mempunyai kuasa untuk memberikan relief seperti mana yang dipohon terhadap defendan. Dalam keadaan-keadaan itu, tidak boleh dikatakan bahawa defendan adalah dilindungi sepenuhnya oleh kekebalan seperti yang didakwa (lihat ms 315I dan 316A–B); *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 diikut.]

Notes

For cases on striking out of writ of summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3712–3723 and 2749–2753.

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2092–2255.

Cases referred to

Dickinson v Del Solar [1930] 1 KB 376 (refd)

Duff Development Co Ltd v Kelantan Government [1924] AC 797 (refd)

Parlement Belge (1880) 5 PD 197 (refd)

R v Madan [1961] 1 QB 1 (refd)

Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136 (folld)

Engelke v Mussman [1928] AC 433 (refd)

Thai-Europe Tapioca Service Ltd v Government of Pakistan [1975] 1 WLR 1485 (refd)

Legislation referred to

Convention on the Privileges and Immunities of the United Nations 1946 s 22

Courts of Judicature Act 1964 s 23

Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 art 12

Diplomatic Privileges (Vienna Convention) Act 1966

International Organisations (Privileges and Immunities) Act 1992

Rules of the High Court 1980 O 12 r 7

VK Lingam (*V Sivaparanjothi, Satchithanandhan, Peter Raj* and *R Thayalan* with him) (*V Siva & Partners*) for the plaintiffs.

Cyrus Das (*Nantha Balan* and *Trevor George De Silva* with him) (*Shook Lin & Bok*) for the defendant.

Zainun Ali JC: This application by the defendant to set aside and/or strike out the plaintiffs' writ, burgeons with issues of exceptional interest and considerable importance.

It started off with the plaintiffs' action for defamation against the defendant, arising out of an article ('the article') which appeared in the

November 1995 issue of the International Commercial Litigation magazine ('the magazine'), under the caption 'Malaysian Justice on Trial'.

The article is annexed hereby and marked as appendix A. The particulars of the defamatory words are as appended below:

> In answer to questions from the said representatives about the cases in which Dato' VK Lingam represented the plaintiffs in their case against the East Asiatic Co ('EAC'), Insas Bhd and Megapolitan Nominees Sdn Bhd against Ayer Molek Co Bhd, Tan Sri Dato' Vincent Tan Chee Yioun against the publishers of the Malaysian Industry & Ors, Berjaya Industrial Bhd and Berjaya Corp (Cayman) Ltd against CS First Boston and about the alleged abuse of judicial procedures and/or about the alleged corruption of the judiciary by Dato' VK Lingam in connivance with his clients in those cases, the defendant said:
>
> > 'This case looks like a very obvious, perhaps even glaring, example of judge-choosing.
> >
> > It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending.
> >
> > I do not think that Malaysia would be able to repeat the result when its system of justice was ranked at the beginning of 1995 by the World Economic Forum in the top 25 systems in the world on the basis of replies by major companies in Malaysia, when asked what level of confidence they had in the justice system in the country in which they were located.
> >
> > Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice. But I do not want any of the people involved to think I have yet made up my mind.
> >
> > Although these complaints only really came to prominence because of the judge-choosing allegations in the Ayer Molek affair, people first started to question the integrity of the judiciary after the US$4m (RM10m) libel award Vincent Tan received on 22 October last year.'

It was the plaintiffs' case that the defendant had spoken to one David Samuels — a staff writer of the magazine who had caused publication of the impugned article in the magazine concerning the plaintiffs and concerning them in the way of their business in relation to their conduct therein. The plaintiffs' claim that the article had gravely and seriously injured them in their trading reputation and had brought them into public scandal, odium and contempt.

The first plaintiff is a listed company on the Kuala Lumpur Stock Exchange whilst the second plaintiff is a licensed stock broking company.

The defendant is an advocate and solicitor of the High Court of Malaya and the chief executive and partner of Shook Lin & Bok — an established firm of advocates and solicitors in Malaysia.

It was the plaintiffs' case that the defendant had published or caused re-publication of the defamatory words or their gist in the magazine.

The plaintiffs contended, further and in the alternative, that the defendant had caused and/or participated in the publication of the whole of the article.

Thus, based on a series of facts and matters in support, the first plaintiff's claim as against the defendant was for damages amounting to RM15m including exemplary damages for slander.

The second plaintiff's claim as against the defendant was for damages amounting to RM15m including exemplary damages for slander.

As regards libel, both the first and second plaintiffs' claim as against the defendant was for RM15m each including exemplary damages for libel and in addition, both the first and second plaintiffs claimed interest at the rate of 8% per annum on the sum of damages awarded on both claims adverted to above, from the date of judgment to date of full realization.

The plaintiffs also claim for an order of injunction to restrain the defendant whether by himself, his servant or agent or otherwise howsoever from further speaking or publishing or causing to be published, the said or any similar words defamatory of the plaintiffs.

The defendant's case was that the statement attributed to him in the magazine were made in his capacity as a United Nations Special Rapporteur on the independence of judges and lawyers and that it was made in the course of his mission as such. On that score, the defendant claimed he was immune from legal process of every kind and that therefore this court had no jurisdiction to hear the plaintiffs' action.

Upon publication of the said article, V Siva & Partners on behalf of the plaintiffs, wrote to the defendant on 26 February 1996 expressing concern over the alleged defamatory words in the magazine and made proposals to lessen the plaintiff's mortification.

This was met with a reply from Shook Lin & Bok in a letter dated 1 March 1996, who informed the plaintiffs' solicitors regarding the status of the defendant as a United Nations Special Rapporteur. Thus, the plaintiffs were put on notice that when the defendant made the statement, it was in his capacity as such and so this necessarily precluded him from being sued for defamation, as he was protected with immunity.

With admirable alacrity, the Centre from Human Rights of the United Nations Office at Geneva wrote to the plaintiffs' solicitors asserting the defendant's immunity from legal process under s 22 of the Convention on the Privileges and Immunities of the United Nations 1946 ('the Convention').

It would be pertinent to state what s 22 of the Convention contains. It reads:

> Experts (other than officials coming within the scope of art V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:

(a) immunity from personal arrest or detention and from seizure of their personal baggage; A

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations; B

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions; C

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

D

Further, the defendant took the view that as a matter of fact, the act complained of was of such a nature as brought him within the protective cloak of immunity by virtue of his mandate as well as under art 12 of the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ('the 1949 Order').

The Convention was adopted by the General Assembly of the United Nations on 18 February 1946 and acceded to by Malaysia on 28 October 1957. E

By acceding to the Convention, Malaysia had incorporated the terms thereof. This obligation was given statutory footing as expressed in the Diplomatic Privileges (Vienna Convention) Act 1966 and the International Organizations (Privileges and Immunities) Act 1992. F

It was imperative that the position of the defendant was properly ascertained.

The defendant was appointed as a United Nations Special Rapporteur for a three-year period, pursuant to a letter dated 2 April 1994, issued by the Chairman of the Commission of Human Rights. G

The defendant's mandate was, in essence, spelled out as follows:

(a) to inquire into any substantial allegations transmitted to him or her and to report his or her conclusions thereon;

H

(b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence and make concrete recommendations including recommendations for the provision of advisory services or technical assistance when they are requested by the state concerned; I

(c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

A The defendant's mandate was also clearly stated in the certificate ('the certificate') under s 7(1) of the International Organization (Privileges and Immunities) Act 1992, given under the hand of the Minister of Foreign Affairs — which will be referred to in due course.

The defendant's claim that immunity attached to him and that
B therefore this court had no jurisdiction as against him in the writ, would necessitate a brief on the position of a United Nations Special Rapporteur.

Although literature on this subject does not seem prolific, one that can be relied on is the work of Henry G Schermers and Niels M Blokker, where it is stated that:

C > Secondary organs report to a superior organ. They often appoint a rapporteur to prepare reports on the basis of their discussions. In such a report, recommendations are made to the superior organ and usually also explained ... .

In *Satow's Guide to Diplomatic Practice* (5th Ed, 1979) it is illustrated that:

D > ... his functions as a 'rapporteur' are to summarize the discussions in the form of a report showing the conclusions arrived at by the committee in the matter. This report, which is first submitted to the members of the committee is then communicated by him to the plenary body and he is the mouthpiece of the committee in placing their decision before that body. And similarly in the case of a sub-committee which has been appointed to report to the
E committee itself.

Thus far, it appears that there is more than a semblance of a work ethics involving rapporteurs. This is relevant, for it is contended by the plaintiffs that the defendant had departed from the straight and narrow path of reporting to the commission as envisaged by the mandate given to him
F when he spoke to David Samuels of the magazine.

It was the plaintiffs' case that the defendant's mandate was a functional, limited and a qualified one in its scope; that for as long as he performed his duties and functions *within the scope* of his mandate, he enjoyed the privileges and immunities under s 22 of the Convention. It
G was further contended by the plaintiffs that by so making the alleged defamatory statement against the plaintiffs to a private commercial litigation magazine, the defendant had clearly acted outside his mandate and therefore was not entitled to immunity.

The matter seemed further exacerbated since the defendant had yet
H to complete his findings and report his conclusions to the Commission on Human Rights, in accordance with his mandate — yet in what is perceived by the plaintiffs to be a hostile move — the defendant spoke and published the alleged defamatory words in the magazine.

Pursuant to this, the plaintiffs filed the writ. The defendant entered conditional appearance and filed a summons under O 12 r 7 of the Rules
I of the High Court 1980 ('the RHC') to set aside the writ and/or to strike it out.

There were submissions as to whether, by so accepting service through his solicitors and entering conditional appearance, the defendant had in

fact submitted to the court's jurisdiction. This would of course be ironic since the basis of this application to set aside was the plea that there was absence of jurisdiction.

However, that could easily be met with the answer that no submission may be inferred merely from the above course of action taken by the defendant. The plethora of authorities have substantiated this point.

Whilst there is a dearth of the legal definition of the term 'expert on mission', the International Court of Justice ('the ICJ') had pointed out that international practice displayed a multitude of activities — increasingly varied in nature — being 'missions' for the United Nations within the meaning of art VI without depending on specific qualifications.

It is common ground that in so far as the defendant was concerned, he was, as a Special Rapporteur to the United Nations, construed and styled as an 'expert on mission'.

To set the matter in its perspective, it was pivotal to this application to ascertain the extent of the immunity afforded to experts on mission under s 22 of the Convention. This point was considered by the ICJ in its advisory opinion dated 15 December 1989 on the applicability of art VI, s 22 of the Convention on the Privileges and Immunities of the United Nations (*'Mazilu's case'*).

It was held by the ICJ at pp 196 and 197 that:

> In accordance with the practice followed by many United Nations bodies, the sub-commission has from time to time appointed rapporteurs or special rapporteurs with the task of studying specified subjects. These rapporteurs or special rapporteurs are normally selected from members of the sub-commission. However, over the past ten years, special rapporteurs have, on at least three occasions, been appointed from outside the sub-commission. Furthermore, in numerous cases, special rapporteurs appointed from members of the sub-commission have completed their reports only after their membership of the sub-commission had expired. In any event, rapporteurs or special rapporteurs are entrusted by the sub-commission with a research mission. Their functions are diverse, since they have to compile, analyse and check the existing documentation on the problem to be studied, prepare a report making appropriate recommendations and present the report to the sub-commission. Since their status is neither that of a representative of a member State nor that of a United Nations official, and since they carry out such research independently for the United Nations, they must be regarded as experts on missions within the meaning of s 22, even in the event that they are not, or are no longer members of the sub-commission. Consequently they enjoy, in accordance with s 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the sub-commission.

This summation drew the line at the degree of the expert's privileges and immunities and this was recounted by Mohd Shahabuddeen J as follows:

> I accept as accurate Romania's statement 'that an expert is not accorded such privileges and immunities anywhere and everywhere': their functional character clearly excludes so wholesale and undiscriminating an application.

A The ICJ's observation in *Mazilu's case* seemed to be in accordance with contemporary thinking that the doctrine of absolute immunity as established in the long line of authorities such as *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 1 WLR 1485, is passe. In fact, as case laws have shown, what has emerged is that the restrictive theory holds the field.

B It was forcefully submitted by Dato' VK Lingam, for the plaintiffs, that the defendant as a Special Rapporteur only enjoyed such privileges and immunities as were necessary for the independent exercise of his functions and that the words spoken and written and acts done by him must have been done in the course of the performance of his mission before his immunity could attract.

C Thus it was argued that ss 22 and 22(b), drafted as it were, do not grant absolute but a qualified and functional immunity borne out of necessity.

The plaintiffs' argument was met by Dr Cyrus Das' succinct appraisal of the situation that one of the basic precepts was that immunity of an D official for acts that he performed in his official position was immunity for acts imputable to the organisation, hence not a privilege of the official but a privilege of the United Nations, established by art 2, s 2 of the Convention (see *R v Madan* [1961] 1 QB 1 and *Dickinson v Del Solar* [1930] 1 KB 376, etc).

E Whilst recognizing that the 'expert' is accorded a narrower range of privileges and immunities as are enjoyed by diplomats and the secretary-general and the other 'Higher Officers', the immunity is nevertheless an imperative.

It is perhaps banal to state that the principle of diplomatic and F consular immunity is deeply-rooted in international law; given the age-old institution of diplomacy with its concomitant privileges and immunities, one can only imagine the tenacity of the proponents.

However, given also that the expert is empowered for a specific task and on the basis of functional need, a different perspective may be called forth.

G The defendant's unwillingness to shed his mantle of immunity seemed fortified by the letters from officials of the United Nations in support of his status and performance which was envisaged as being in the course of his mission.

H The letters from Georg Mautner-Markhof and Ralph Zacklin were the forerunners of this show of support, culminating in the certificate issued by no less than the Secretary-General of the United Nations himself, Mr Kofi A Annan. The certificate reads as follows:

> In connection with Civil Suit No S3–23–68 of 1996 by MBf Capital Bhd and MBf Northern Securities Sdn Bhd against Dato' Param Cumaraswamy, I the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities

accorded to experts performing missions for the United Nations under arts VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 28 October 1957 without any reservation. A

In accordance with s 22 of art VI of the Convention, 'experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions...'. Section 22(b) of the Convention further provides that 'they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind'. As such, the Special Rapporteur on the independence of judges and lawyers is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission. B C

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto. D

Under s 34 of the Convention, the Government of Malaysia has a legal obligation to 'be in a position under its own law to give effect to the terms of this Convention'. The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations. E

Couched as is the Secretary-General's certificate in a language which is both vigorous and assertive as regards the defendant's act — deemed to be in the course of his mission and therefore the cloak of immunity never left him — one is left with the question as to what probative value one should accord the said certificate. F

Dato' VK Lingam's curt response is that the assertion of immunity had in fact created a 'new' level of immunity not contemplated by the Convention. Counsel looked askance at the Secretary-General's certificate and questioned the Secretary-General's right to 'determine' that the defendant's act was within his mission, in the absence of any evidence to show how that determination was arrived at. G

Dr Cyrus Das responded that the sanction evident in the Secretary-General's certificate embodied the implicit right to do so, given that there was a right to a waiver. H

Dr Cyrus Das was at pains to draw this court's attention to the concern and specific reference made to the plaintiff's action in the Secretary-General's certificate and that the Secretary-General had determined that the impugned words spoken by the defendant were spoken in the course of his mission. I

It might be relevant now to look at s 23 of the Convention which reads as follows:

> Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves.

A The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Counsel for both parties articulated at length over the implication and B effect of the Secretary-General's assertion of immunity. However, at this stage I shall not concern myself with the subtleties and nuances of the equation between waiver against the assertion of immunity under s 23.

What is in issue is, how should this court view the Secretary-General's certificate at this stage?

C Given that the Secretary-General holds down what is probably one of the most important positions in the World Order today, the certificate issuing from him should not be presumed to be made in cavalier fashion nor be cast aside at will.

However, it stands viewed as an opinion and has no more probative D value than a document which appears wanting in material particulars.

It would indeed be a naive supposition if it is to be construed as being conclusive, since can one be heard to say 'cest fait' and therefore, that is the end of the matter. Surely not.

It might be asked whether allowing the certificate to hold sway, E would in effect, tantamount to subordinating the competence of this court to deal with any dispute that may arise, although the general notion is that national courts should not assume the function of arbiters of conflicts such as is evident in this case.

However, soon after the Secretary-General's certificate, came the certificate from the Minister of Foreign Affairs ('the Minister') dated F 12 March 1997.

The Minister's certificate was issued pursuant to s 7 of the International Organisations (Privileges and Immunities) Act 1992 which reads as follows:

G (1) The Minister may give a certificate in writing certifying any fact relating to the question whether a person is, or was at any time or in respect of any period, entitled, by virtue of this Act or the regulations, to any privileges or immunities.

(2) In any proceedings, a certificate given under this section is evidence of the facts certified.

H The Minister's certificate in effect endorsed the position of the defendant as a Special Rapporteur and indicated his mandate — or rather in the words of the plaintiffs' counsel — the extent of that mandate.

The Minister's certificate reads thus:

I I, Datuk Abdullah bin Hj Ahmad Badawi, Minister of Foreign Affairs, Malaysia by virtue of the power granted to me under s 7(1) of the International Organizations (Privileges and Immunities) Act 1992 hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the independence of judges and lawyers, whose mandate is as follows:

(a) to inquire into any substantial allegations transmitted to him and report his conclusions; A

(b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provisions of advisory services or technical assistance when they are requested by the State concerned; and B

(c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission. C D

In more ways than one, the Minister's certificate triggered a diverse response from both parties.

Dr Cyrus Das concluded, not unnaturally, that it could only be construed that the Minister had acceded to the Secretary-General's request to accord immunity to the defendant, coming as it did, close on the heels of the Secretary-General's certificate of 7 March 1997. E

Dato' VK Lingam resisted that notion and went further to submit that the certificate made no specific reference to the present civil suit at all.

The certificate would appear to be no more than a bland statement as to a state of fact pertaining to the defendant's status and mandate as a Special Rapporteur and appeared to have room for interpretation. F

The plaintiffs' counsel contended that the certificate was clearly of a functional nature which in practical terms, limited the immunity accorded to the defendant.

In reply, several authorities were brought forth by the defendant to show that the certificate from an executive (as is the Minister's certificate), should be accepted by the court as conclusive, for in the words of Lord Cave in *Duff Development Co Ltd v Kelantan Government* [1924] AC 797: G

> ... it is the duty of the court to accept the Statement of the Secretary of State thus clearly and positively made as conclusive upon the point ... . H

In *Parlement Belge* (1880) 5 PD 197, an important statement was made by James LJ who said:

> ... I apprehend that we should be bound to act on the representation of the Foreign Office ... .

I

And as if in answer to my unspoken thought, Dr Cyrus Das for the defendant echoed the view of the court in *Engelke v Mussman* [1928] AC 433:

A

> ... the certificate is no attempt on the part of the executive to interfere with the judiciary of the country.

Dr Cyrus continued in the same strain that the Minister's certificate should not be read to be at odds with the certificate of the Secretary-General.

B Much argument was canvassed by both parties on the issue of the Minister's certificate, not least since it was deemed to embody the executive's stance on the subject.

This court certainly holds the view that the Minister's certificate, in as much as the Secretary-General's certificate is concerned, was carefully C issued and was certainly not born out of caprice.

However, possessed as I am of this knowledge, I am bound to consider the current posture that:

> ... since there are categories of fact of which the executive had knowledge peculiar to itself, it is proper for the courts to inquire of the executive in D such matters (B Sen in his work *Diplomatic & Consular Privileges*).

Satow in his commentary stated that:

> ... The court's role in relating to questions of diplomatic immunity has been classified and signified by the guidance on the law provided by the Vienna E Conventions. It is still the court of a country that have the final word in many cases on who and what are entitled to diplomatic immunity where such questions would be decided by the court on the basis of domestic law and practice.

A quick look at the cases have shown that the state merely transmits the F claim for immunity, leaving it to the court to examine the truth of the allegation of fact on which it was based.

There were cases where the courts proceeded to decide the question of immunity without any reference to the executive, based as it were, on general rules of comity.

G Thus, given the differing views expressed, the matter appeared to be rather fluid and therefore the issue which needed to be addressed was whether the certificate bore scrutiny.

At the risk of being unwittingly drawn at this stage into the question of the probative status of both the Secretary-General's and the Minister's H certificate, I find that there is compelling ground to resist judicial self-restraint.

So, the question as to whether the defendant's act was or was not within scope was an elusive inquiry, to be answered only when matters of evidence was before this court. Thus, in that regard, this court would have I to consider the whole context in which the claim against the defendant was made, with a view to deciding whether the relevant act upon which the plaintiffs' claim was based should, in that connection, be contemplated as fairly within the area of activity of his mandate or otherwise.

It is of course axiomatic that the defendant's immunity hung very much on the nature of the act and not on its purpose. A

Thus, on this fragile premise, I shall not venture into anything approaching an analytical inquiry, that is, whether the spoken words were defamatory or not.

I shall merely indicate that I am not shackled by any constraint and so would proceed to state that it was open for me to examine the question whether I had jurisdiction to decide this matter. B

Since the nub of the matter was the issue of jurisdiction, it would be useful to define the term. 'Jurisdiction' is the right of the court to enter upon the inquiry as to whether or not a cause of action exist in the plaintiffs' writ and if a cause of action does exist, to grant, or if the relief is discretionary, to withhold the relief sought. C

On the other hand, lack of jurisdiction is the absence of any right in the court to enter into upon such an inquiry at all.

For a more comprehensive approach to this subject, it would be useful to see when a properly-constituted court would lack jurisdiction. It may lack jurisdiction on four grounds — as clearly indicated by Lord Diplock in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136, PC. D

The four grounds are: E

(1) because the condition precedent to its entering upon the inquiry had not been fulfilled — for eg, a requirement such as existed in some countries that notice be given to the Government before starting an action against it;

(2) because of the status of one of the parties to the action — for eg, an action brought against a foreign sovereign or ambassador who had not consented to the jurisdiction; F

(3) because of the subject matter of the dispute in respect of which the relief was sought — for eg, a dispute involving the title to foreign land;

(4) because of the nature of the relief sought, for eg an injunction against the Crown. G

Lack of jurisdiction may be due to any one or more of those grounds.

It is evident from the above that the position in the present case was based on the second ground. H

The position of the defendant was in focus and was pivotal to this application where it hinged on the defendant's person.

In as much as immunity was imputed to the organization in cases where officials or experts of the organization were concerned, it was equally relevant that the person of the defendant determined the fate of his application. I

It would therefore appear that whether the defendant, as a Special Rapporteur of the United Nations was entitled to so claim immunity

would consequently determine whether this court lacked jurisdiction or otherwise.

Thus for this purpose, I will treat it as if the defendant's summons spoke of the alleged defamation. I shall also assume that if the plaintiff's action was allowed to proceed, the plaintiffs would be in a position to establish his case.

This is to underpin the importance of distinguishing between the court's jurisdiction to entertain the plaintiffs' action at all, that is to embark upon the enquiry whether facts exist, which would entitle the court to grant the relief claimed and the accepted practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclosed a particular kind of factual situation.

The foregoing therefore prompts me to ask myself whether I have the jurisdiction to enter into an inquiry to hear this application.

In addition to the second ground adverted to earlier (ie the status of the defendant as 'expert') for this purpose, the question of jurisdiction also took its colour from the position of the defendant.

Section 23 of the Courts of Judicature Act 1964 invests this court with jurisdiction since the criterion for residence and place of business — as well as the facts on which the proceedings based exist, or are alleged to have occurred — are within this court's jurisdiction.

In that connection, it was relevant whether the defendant could now implead that he was immune from due process.

Having regard to the matter in its entirety, it is inevitable that I need to postulate that at this interlocutory stage, it is not for me to determine whether the said words imputed to the defendant are defamatory or not. Only the question of jurisdiction looms large.

Towards that end, I must assume that all the allegations as enclosed in the statement of claim are true without deciding it to be so.

To do this, I have to see whether the facts placed before me and the relevant laws cited to me oust the jurisdiction of this court.

It is a fact that the defendant is a Special Rapporteur with the United Nations. It is a fact that he made the statement to the magazine.

Even assuming for a moment that the statement was damning and consequently defamatory, I would have to ascertain whether it would exclude the defendant from the jurisdiction of this court.

On the first point there was no dispute. Even on the second, the court's jurisdiction was not ousted even if *Mazilu's case* point otherwise, since the ICJ's decision was not binding on this court on a point of public international law and in any event, on the facts made available to me at this interlocutory stage, there was no evidence to suggest that the test set out in *Mazilu's case* had been met.

Therefore hackneyed as it may sound, I must reiterate that for purposes of determining jurisdiction, I must assume that the allegation in the plaintiffs' statement of claim was true and:

> Since lack of jurisdiction has the consequence that the court has no right to enter upon the enquiry as to whether there exist a state of facts which would entitle the court to grant to the plaintiff the relief sought, the jurisdiction summons can succeed only if it is shown that no matter what were the facts, that the plaintiff would be able to establish, relating to the subject matter of the dispute, the court would have no power to grant relief of the kind sought against the defendant (per Lord Diplock in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 at p 1152E–F, PC).

In the circumstances, I am unable to hold that the defendant was absolutely protected by the immunity he claimed.

That did not mean however, that the defendant was estopped from adducing further evidence at trial to support his claim.

If — at the end of the trial of the plaintiffs' action, after taking all evidence from the parties — I come to the conclusion that immunity attached to the defendant, the defendant may succeed at that stage.

All I am deciding for the moment is that on the evidence before me, I have jurisdiction to hear this application and I make the following order, namely that:

(1) the defendant's summons be dismissed with costs; and

(2) costs are to be taxed and paid forthwith; and

(3) the defendant is to file and serve his defence within 14 days from the date of this order.

Application dismissed.

Reported by Mariette Peters-Goh